Supreme Court, U. S.
FILED
DEC 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-962

THOMAS J. PURVIS, et al,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX


Page

Opinions Below ..... 2

Jurisdiction ..... 2

Questions Presented ..... 2

Statutes Involved ..... 3

Statement of the Case ..... 3

Reasons for Granting the Writ ..... 5

Conclusion ..... 16

APPENDIX:

Opinion of United States Court of Appeals for the Fifth Circuit ..... 1a

Judgment and Order of the United States District Court for the Southern District of Alabama ..... 14a

Indictment, dated June 27, 1977, filed in the United States District Court for the Southern District of Alabama charging all Petitioners with violating 18 U.S.C. §241 and James H. Stanford with violating 18 U.S.C. §242 ..... 24a

Order of United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc ..... 29a

## TABLE OF AUTHORITIES

Page

Buchanan v. United States, 233 F. 257 (8th Cir. 1916) ..... 9,10

Francis v. Henderson, 425 U.S. 536 (1976) ..... 12

Pullen v. United States, 164 F.2d 756 (5th Cir. 1947) ..... 15

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ..... 13

Screws v. United States, 325 U.S. 91 (1945) .6,13,14

Stone v. Powell, 428 U.S. 465 (1976) ..... 12

United States v. Cruikshank, 92 U.S. 542 (1876) ..... 7,8

United States v. Guest, 383 U.S. 745 (1967) ..11,13

United States v. Price, 383 U.S. 787 (1966) ....6,14

United States v. Purvis, 436 F.Supp. 770 (S.D.Ala. 1977) ..... 5,7,9

United States v. Purvis, 580 F.2d 853 (5th Cir. 1978) ..... 5

Wainwright v. Sykes, 433 U.S. 72 (1977) .... 12-13

Wilkins v. United States, 376 F.2d 552 (5th Cir. 1967) ..... 8,9

*Statutes and Regulations*

Enforcement Act of 1870, 16 Stat. 140 ..... 7

18 U.S.C. §241 ..... *passim*

18 U.S.C. §242 ..... 5,13,14

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The Petitioners, Thomas J. Purvis, Charles C. Wimberly, Sr., William L. Shirley, Jr., John C. McCorvey, Jr., Harold E. Donald, Harry L. Hutton, Jr., James J. Manning, Cecil E. Byrd and James H. Stanford, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing a judgment rendered by the United States District Court for the Southern District of Alabama.

## OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Alabama is reported at 436 F.Supp. 770 (S.D. Ala. 1977), and is set out in the Appendix, *infra*, p. 14a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 580 F.2d 853 and is set out in the Appendix, *infra*, p. 1a.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1978, and a timely petition for rehearing en banc was denied on November 15, 1978 (Appendix, *infra*, p. 29a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether an indictment seeking to charge a violation of 18 U.S.C. §241, a statute requiring the specific intent to deny a federally secured right as an essential element of the offense, may inferentially allege that intent from allegations of fact contained therein.

2. Whether the fundamental distinction between a functional and an intentional deprivation of a civil right mandates a positive averment of specific intent to deny such a right in an indictment seeking to allege such a deprivation.



## STATUTES INVOLVED

18 U.S.C. §241:

*Conspiracy against rights of citizens*

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

As amended April 11, 1968, Pub.L. 90-284, §103(a), 82 Stat. 75. . . . .

## STATEMENT OF THE CASE

The jurisdiction of the district court was invoked by the filing of a two-count indictment seeking to allege a violation of 18 U.S.C. §241. Count One of the indictment, which was filed in the United States District Court for the Southern District of Alabama, alleged in pertinent part that:

"From in or about the summer of 1976, to on or about October 12, 1976, in the Southern Division of the Southern District of Alabama, the Defendants, THOMAS J. PURVIS, CHARLES C. WIMBERLY, SR., WILLIAM L. SHIRLEY, JR., JOHN C. McCORVEY, JR., HAROLD DONALD, HARRY L. HUTTON, JR., JAMES J. MANNING, CECIL E. BYRD, and JAMES H. STANFORD, while acting as officials of the Mobile County Sheriff's Department, conspired together, with each other, and with other persons to the Grand Jury known and unknown, to injure, oppress, threaten and intimidate inmates of the Mobile County Jail who were citizens of the United States in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and Laws of the United States not to be deprived of life without due process of law, which conspiracy resulted in the death of Louis Wallace, an inmate in the Mobile County Jail.

'It was part of the plan and purpose of the conspiracy that the conspirators would, without lawful authority, shoot from ambush one or more of the said inmates during a planned escape attempt which was to occur through a hole dug in the wall of the Mobile County Jail, of which escape attempt the conspirators had prior knowledge.' "



This Petition is concerned only with Count One.

All of the Defendants below moved to dismiss the indictment for failure to allege an intent to deny a federally secured right. James H. Stanford, the only defendant charged in Count Two, moved to dismiss that count, which sought to allege a violation of 18 U.S.C. §242, for failure to allege a willful deprivation of a civil right. After due consideration, the District Court dismissed both counts for the reasons asserted. *United States v. Purvis*, 436 F.Supp. 770 (S.D. Ala. 1977).

The government appealed the district court's ruling only as to Count One to the United States Court of Appeals for the Fifth Circuit. In an opinion dated September 25, 1978, the Court of Appeals reversed. *United States v. Purvis*, 580 F.2d 853 (5th Cir. 1978). The Circuit Court conceded that mere evidence of an intent to kill Louis Wallace would not prove an offense under 18 U.S.C. §241 and that the defendants would be entitled to a jury instruction on the requisite intent but concluded that the indictment alleged sufficient facts to show an intent to deprive inmates of the Mobile County Jail of a federally guaranteed right. A timely petition for rehearing en banc was duly filed but denied on November 15, 1978.

## REASONS FOR GRANTING THE WRIT

This case involves the important question of whether the fundamental distinction between a functional and an intentional deprivation of a federally

guaranteed right mandates a positive averment of the specific intent to deny such a right in an indictment seeking to allege a violation of 18 U.S.C. §241. The case further involves the equally significant issue of whether the absence of such a positive averment of the specific intent to deny a federally secured right impermissibly broadens the application of 18 U.S.C. §241 and federal criminal jurisdiction to include prosecutions for every functional denial of a federal civil right. This manner of statutory application could effectively deprive the states of the right to enforce their own laws.

At the outset, it must be recognized that 18 U.S.C. §241 is a unique species of statute addressed to the specific ill of racial discrimination. The narrow scope of the statute, therefore, makes it conceptually distinct from the generalized characterization of conspiracy in the opinion of the Court of Appeals. A synopsis of the history of 18 U.S.C. §241 is provided in *Screws v. United States*, 325 U.S. 91 (1945), and *United States v. Price*, 383 U.S. 787 (1966). It logically follows, therefore, that an indictment seeking to charge a violation of 18 U.S.C. §241, a statute requiring the specific intent to deny a federally secured right as an essential element of the offense, must positively, not inferentially, aver that specific intent. As the district court so correctly stated:

> "The question in Count One is *not* whether the Defendants intended to act unlawfully. The question is did the Defendants 'intend to deprive Wallace of his civil rights.' " *United States v. Purvis*, supra, at 772 (S.D. Ala. 1977) (emphasis in original).



1. The decision below conflicts with this Court's decision of *United States v. Cruikshank*, 92 U.S. 542 (1876). That decision considered an indictment brought under §6 of the Enforcement Act of 1870, a statutory predecessor to 18 U.S.C. §241. The indictment was framed in sixteen different counts, which this Court placed in two categories: (1) those counts found to be insufficient because they did not show that it was the intent of the defendants, by their conspiracy, to deny a federally secured right; and (2) those counts which failed to specify the particular right allegedly denied. The defect in the *Purvis* indictment, failure to allege the requisite specific intent, clearly falls within the first category. *Cruikshank* expressly holds that the specific intent to deprive a citizen of a federally secured right, an essential element of the offense sought to be charged by the indictment at issue, must be positively alleged. Counts Six and Fourteen of the *Cruikshank* indictment are most illustrative of the conflict between the Fifth Circuit's decision and that of this Court. These counts allege the intent of the defendants to hinder and prevent the citizens named "being of African descent and colored" from exercising the right of sufferage. In addressing this defect in the allegation, this Court emphasized the essential requisite of the specific intent to deny a federally secured right.

> "Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants

> was to prevent these parties from exercising their right to vote, on account of their race, it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or Laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance." 92 U.S. 542, 556.

The Court of Appeals erroneously and imprecisely limits the holding in *Cruikshank* to those counts which failed to specify the particular right allegedly denied, ignoring completely the question presented by the instant indictment.

This incomplete analysis is accentuated by the Fifth Circuit's own decision in *Wilkins v. United States*, 376 F.2d 552 (5th Cir. 1967), which relies upon *Cruikshank* in restating that an indictment brought under 18 U.S.C. §241 "must allege that it was the intent of the defendants, by their conspiracy to hinder or prevent the enjoyment of some right granted or secured by the Constitution, and must charge positively and not inferentially everything essential." 376 F.2d at 562.

The opinion below saps the vitality of *Cruikshank* and



*Wilkins* and erodes their precedential value without forthrightly addressing the fundamental import of those decisions.

2. The decision below is in conflict with the Eighth Circuit's decision in *Buchanan v. United States*, 233 F. 257 (8th Cir. 1916).

The theoretical basis for the paramountcy of specific intent to deny a federally secured right is articulated in *Buchanan v. United States*, supra. As in *Purvis*, the defendants in *Buchanan* were charged with conspiring to violate a federally secured right. The Eighth Circuit stated that if the defendants committed acts which functionally denied federal rights but performed them in the belief that their action served a legitimate purpose, then "they did not violate (§241)."

The *Buchanan* court recognized that a homicide that operates as a denial of federal rights might not arise from an intent to deprive a person of a federal right but from "personal malice," which would not effectuate §241.

Of cardinal significance to the instant case is the Eighth Circuit's fundamental distinction between a functional and an intentional deprivation of a civil right. Many common law offenses functionally deny a federally secured right. The *Buchanan* hypothesis referring to homicide is illustrative of this. Similarly, a larceny or robbery operates to deprive its victim of

property without due process of law. False imprisonment is a denial of liberty. Yet all conspiracies to kill, to take property, or to deprive one of liberty do not violate 18 U.S.C. §241.

The logical consequence of this basic distinction is the necessity of alleging the particular intent to deny a federally secured right in an indictment brought under §241. For without such a particularized allegation of intent, the scope of federal criminal jurisdiction could be enormously expanded to include prosecutions for every functional denial of a civil right.

3. The decision below ignores the essential conceptual distinction between a functional and an intentional deprivation of a federally guaranteed right and the concomitant need for a particularized allegation of the specific intent to deny such a right in an indictment seeking to charge a violation of 18 U.S.C. §241.

The opinion of the Court of Appeals is largely premised upon the conclusion that the indictment avers adequate facts to sufficiently allege an intent to deny a federally secured right. This conclusion is not supported by the language of the indictment. Read in the broadest terms, the indictment may allege the intent to commit an unlawful act, but it does not allege the specific intent to deny a federally secured right. As *Buchanan v. United States*, supra, illustrates, a conspiracy to "injure, oppress, threaten, and intimidate" could be motivated by a host of intentions. A multitude of intentions, moreover, could induce the shooting of an inmate "without lawful authority."



The shooting of Louis Wallace could have resulted from a good faith effort to prevent a jail escape. All of the defendants below are law enforcement officers. The decedent had emerged from a hole in the wall of the county jail. For aught that appears, his death resulted from the officers' belief that they were performing their legitimate duty of preventing a jail escape.

The opinion below acknowledges that "(m)ere evidence of an intent to kill Wallace would not prove an offense under the federal statute." 580 F.2d at 857. The logical extension of this premise, therefore, can only be that an allegation of an intent to commit an unlawful act does not allege a violation of 18 U.S.C. §241.

4. The decision of the Court of Appeals impermissibly broadens the application of 18 U.S.C. §241 by effectively creating a federal common law cause of action for every functional denial of a civil right. The mandate of a positive averment of specific intent to deny a federal right, which is an essential prerequisite to a violation of the statute, is eviscerated by the opinion below, resulting in a potentially enormous expansion of federal criminal jurisdiction.

Not every criminal conspiracy affecting an individual's civil rights is within the sanction of 18 U.S.C. §241. *United States v. Guest*, 383 U.S. 745 (1967). Federal

jurisdiction is invoked only when an act is motivated by the specific intent to deny a federally secured right. Though the court below initially recognizes this basic tenant, it then proceeds to erode its viability by holding that an indictment which simply charges a conspiracy to do an act sufficiently alleges a violation of 18 U.S.C. §241. Precedent requires not only an allegation of specific intent to deny a federally secured right, but a *positive* averment of such intent.

If the bare allegation of a conspiracy to do an act invokes federal jurisdiction, the federal government would have broad discretion to prosecute every murder, robbery, larceny and any other functional denial of a federally secured right. The result would be an accompanying erosion of the States' rights to enforce their own laws.

Recent decisions of this Court reflect a due deference to the maintenance of a constitutional balance upon which the doctrine of federalism is founded. *Francis v. Henderson*, 425 U.S. 536 (1976), noted the power in the federal courts to entertain a habeas corpus petition questioning a state procedural requirement that challenges to grand jury composition be raised before trial, yet rested its holding on "considerations of comity and concerns for orderly administration of criminal justice . . ." 425 U.S. at 538-539. *Stone v. Powell*, 428 U.S. 465 (1976), is bottomed upon a recognition of the States' right and power to fully and fairly adjudicate a Fourth Amendment claim. See also *Wainwright v. Sykes*,



433 U.S. 72 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (concurring opinion of Powell, J).

The fundamental proposition is that federalism contemplates legal arrangements wholly within the sphere of state police power and others subject to federal intervention. The decision below threatens the division of authority between the States and the national government — federalism.

5. The opinion of the Court of Appeals reflects a highly generalized view of conspiracy and fails to distinguish the intent necessary for conspiracy in general and conspiracy to commit a crime requiring the specific intent to deny a federally secured right.

The issue presented by this cause is not the conceptually distinct question of the sufficiency of a general allegation of conspiracy. Rather, the issue is the sufficiency of an allegation of conspiracy to commit a particular crime requiring a specific form of criminal intent. In interpreting the term "willfull" as it applies to the specific intent to deny a civil right, this Court and the Fifth Circuit explicitly establish that a bad purpose or evil motive does not suffice. *Screws v. United States*, supra; *United States v. Guest*, supra.

The intent element of 18 U.S.C. §241, therefore, is the same as its kindred statute, 18 U.S.C. §242. The absence of the word "intentional" or its derivations in §241 is of no moment, and an indictment brought un-

der that statute must be gauged by the same standard as an indictment pursuant to a statute containing the word "intentional" or a derivative thereof.

On appeal, the government did not challenge the district court's ruling that Count Two, which attempted to charge a violation of 18 U.S.C. §242, was insufficient. Since the specific intent essential to a violation of both statutes is *precisely the same*, it logically follows that if Count Two of the indictment before the Court is insufficient for failure to charge a willfull deprivation of a civil right, Count One must also be deficient for the same reason. As with Count One, the issue in Count Two is not whether the defendants allegedly acted with a *general unlawful intent* but with a *specific intent* to deny a federally secured right.

The common origin, purpose, and history of the two statutes also support the petitioners' contention. Though §241 prohibits a conspiracy to deny a federally secured right while §242 enjoins a substantive denial of a federally protected right by persons acting under color of law, §§241 and 242 are kindred statutes. Both share a common origin, the Reconstruction Era. Both seek to redress essentially the same grievance, racial discrimination. Both apply only to federally secured rights. And, again, both require a specific intent to deny a federal civil right as an essential element of the offense. See *Screws v. United States*, supra, and *United States v. Price*, supra.



The issue, therefore, is precisely the same as that presented in *Pullen v. United States*, 164 F.2d 756 (5th Cir. 1947) and the similarity of issues requires the same conclusion.

6. The omission of an element of the crime is not a mere formality.

The Fifth Circuit's decision constricts the protections charge by indictment is intended to provide. That Court's analytical process seeks to reinforce the wooden notion that the challenge to the instant indictment is technical and addressed only to the indictment's form.

The basis for the attack on the sufficiency of the instant indictment is that a material element of the offense sought to be charged — the specific intent to deny a federal right is omitted from the indictment. This critical omission emphasizes the practical, not technical, challenge to the sufficiency of the indictment. A conviction based on the language of the instant indictment could be found upon any one of a host of intentions totally unrelated to a willfull deprivation of a civil right. This judicial precedent and the statute itself prohibit.

The opinion of the Court of Appeals can be reduced to the following *non sequitor:* though the specific intent to deny a federally secured right must be proved and the defendants would be entitled to a jury instruction

on the requisite intent, it need not be alleged in the indictment.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

versus

Thomas J. PURVIS et al.,
Defendants-Appellees.

No. 77-2849.

United States Court of Appeals,
Fifth Circuit.

Sept. 25, 1978.

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Appeal from the United States District Court for the Southern District of Alabama.

Before RONEY, RUBIN and VANCE, Circuit Judges.

RONEY, Circuit Judge:

The defendants were indicted for a conspiracy to deprive the inmates of the Mobile County jail of their rights and privileges as citizens of the United States, which resulted in the shooting death of an inmate during an escape attempt. 18 U.S.C.A. § 241. The district court dismissed the indictment for its failure to allege intent in specific words. The United States appeals. We

reverse. The allegations in the indictment were not fatally deficient for lack of some special formula of words to specify intent, and they fairly inform defendants of the charge against them.

The indictment charged nine defendants with conspiracy in violation of 18 U.S.C.A. § 241.[1] It is alleged that defendants, "while acting as officials of the Mobile County [Alabama] Sheriff's Department" in the summer of 1976, decided that future escape attempts from the Mobile County jail could be deterred only by the death of an escaping inmate. In furtherance of this plan and having learned of a planned escape attempt through a hole in the north wall, defendants agreed to monitor progress, conceal themselves, and ambush the escaping prisoners. As a result, the indictment alleges, a deputy sheriff shot inmate Louis Wallace to death when he attempted to escape through the hole. The indictment charges that this shooting was "part of the

1 18 U.S.C.A. § 241 reads:

*Conspiracy against rights of citizens*

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.



plan and purpose" of the conspiracy and was "without lawful authority."

The defendants moved to dismiss on the ground that the indictment was defective. The district court dismissed the indictment without prejudice. *United States v. Purvis*, 436 F.Supp. 770 (S.D. Ala.1977). It held that the indictment failed to allege that defendants specifically intended to deprive Wallace of rights secured by the Constitution, relying on *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 23 L.Ed. 588 (1876), and *Wilkins v. United States*, 376 F.2d 552 (5th Cir.), *cert. denied*, 389 U.S. 964, 88 S.Ct. 342, 19 L.Ed.2d 379 (1967).

Because the Grand Jury which returned the indictment remained sitting even at the time this appeal was argued, the matter could have been returned to it for a rewritten indictment. The United States, however, concerned with other similarly worded indictments framed under this standard charge, argues that the language of the present indictment is satisfactory.

The requisites of a valid indictment under 18 U.S.C.A. § 241 were addressed by the Supreme Court in *United States v. Cruikshank, supra*, in discussing its predecessor statute. *Cruikshank* held an indictment to be vague and uncertain because it failed to specify the particular right conspired against and merely averred a conspiracy against "every, each, all, and singular" of the rights granted by the Constitution. The Court stated that the object of an indictment is

> first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

92 U.S. (2 Otto) at 558.

In *Wilkins v. United States, supra*, this Court considered the essential requisites of a valid indictment under 18 U.S.C.A. § 241. In that case, citing *Cruikshank*, we indicated that a valid indictment

> must allege that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of some right granted or secured by the Constitution, and must charge positively and not inferentially everything essential . . . .

376 F.2d at 562.

"The validity of an indictment is determined from reading the indictment as a whole and . . . must be



determined by practical, not technical, considerations." *United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976) (citations omitted), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977).

The issue before us is whether the indictment, set forth in full below,[2] which tracks the statutory

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COUNT ONE

From in or about the summer of 1976, to on or about October 12, 1976, in the Southern Division of the Southern District of Alabama, the defendants, THOMAS J. PURVIS, CHARLES C. WIMBERLY, SR., WILLIAM L. SHIRLEY, JR., JOHN C. McCORVEY, JR., HAROLD E. DONALD, HARRY L. HUTTON, JR., JAMES J. MANNING, CECIL E. BYRD and JAMES H. STANFORD, while acting as officials of the Mobile County Sheriff's Department, conspired together, with each other, and with other persons to the Grand Jury known and unknown, to injure, oppress, threaten and intimidate inmates of the Mobile County Jail who were citizens of the United States in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and laws of the United States not to be deprived of life without due process of law, which conspiracy resulted in the death of Louis Wallace, an inmate at the Mobile County Jail.

It was part of the plan and purpose of the conspiracy that the conspirators would, without lawful authority, shoot from ambush one or more of the said inmates during a planned escape attempt which was to occur through a hole dug in the wall of the Mobile County Jail, of which escape attempt the conspirators had prior knowledge.

OVERT ACTS

In furtherance of the aforesaid conspiracy, and to accomplish its objectives, the following overt acts, among others, were committed within the Southern Division of the Southern District of Alabama:

(1) In or about the summer of 1976, at the Mobile County Jail, some of the conspirators decided to shoot an inmate during a future escape in order to bring such escapes to a halt.

language of 18 U.S.C.A. § 241 in charging that defendants conspired "to injure, oppress, threaten and intimidate" citizen inmates "in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and the laws of the United States not to be deprived of life without due process of law" is legally sufficient where the indictment does not expressly allege that defendants specifically intended to deprive citizens of constitutional rights.

It should be noted that the point at issue here concerns only the *form* of the indictment. In its argument,

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(2) On October 12, 1976, prior to the death of Louis Wallace, at the Mobile County Jail, and after discovering that inmates in Cellblock 205 were attempting to dig a hole through the north wall of the jail in order to escape, some of the conspirators, at a staff meeting, discussed the upcoming escape attempt and agreed not to stop it and to ambush the inmates as they attempted to escape through the hole in the wall, with the intention of shooting one or more of the said inmates.

(3) On October 12, 1976, at the Mobile County Jail, some of the conspirators caused the north wall of the jail to be surveilled during the day from out of sight of the inmates in order to observe the progress of the escape attempt.

(4) On the evening of October 12, 1976, at the Mobile County Jail, some of the conspirators concealed themselves in the vicinity of the jail in order to carry out the planned ambush and communicated by radio between themselves as to the progress of the digging of the hole in the north wall of the jail.

(5) On the evening of October 12, 1976, at the Mobile County Jail, in furtherance of the aforementioned conspiracy, Deputy Sheriff James H. Stanford shot to death inmate Louis Wallace when Wallace attempted to escape through the hole dug in the north wall of the jail.

In violation of Title 18, United States Code, Section 241.



the Government correctly recognizes that it must prove specific intent to deprive a citizen of constitutional rights to sustain a conviction under 18 U.S.C.A. § 241. Mere evidence of an intent to kill Wallace would not prove an offense under the federal statute; deprivation of a constitutional right must be intended. *United States v. Cruikshank, supra; Wilkins v. United States, supra. See United States v. Guest,* 383 U.S. 745, 760, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). Therefore, we address only the narrow issue of the sufficiency of the instant indictment.

At the outset, it should be noted that 18 U.S.C.A. § 241 itself does not include the term "intentionally" or "willfully" or derivations thereof. Consequently, a different issue is presented here than in the cases cited to us where the statute includes terms omitted from the indictment. *Pullen v. United States,* 164 F.2d 756 (5th Cir. 1947) (for violation of 18 U.S.C.A. § 242); *United States v. Musgrave,* 444 F.2d 755 (5th Cir. 1971) (for violation of 18 U.S.C.A. §§ 371, 657, 1006), *cert. denied,* 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973).

The issue presented here can be precisely stated: when a statute which fails to stipulate that the proscribed acts be done with specific intent has been interpreted to require proof of such intent in order to sustain a conviction, must the indictment contain certain formal legal terms alleging specific intent? No case has been cited or found in which an indictment similar to the one used here has been held invalid under 18

U.S.C.A. § 241. Nor has a case been found dismissing an indictment which tracks the statutory language. While the terms with "intent to deprive" as suggested by the district court, 436 F.Supp. at 772, or "unlawfully, willfully and knowingly" as contained in the indictment in *Anderson v. United States*, 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974) (also an 18 U.S.C.A. § 241 prosecution), quoted by the district court, 436 F.Supp. at 773, allege intent, they are by no means the exclusive formula by which it may be charged.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that an indictment "be a plain, concise and definite written statement of the essential facts constituting the offense charged." This rule has put to an end "the rules of technical and formalized pleading which had characterized an earlier era." *Russell v. United States*, 369 U.S. 749, 762, 82 S.Ct. 1038, 1046, 8 L.Ed.2d 240 (1962) (indictment for failure to answer question pertinent to congressional inquiry invalid for failure to identify subject under inquiry, thereby making determination of pertinency speculative). In reflecting upon the impact of the rule, this Court has said that

> [t]he cynically technical approach which formerly enshrouded the consideration of even the plainest and simplest indictments, and, in many instances, made a mockery of simple justice, no longer governs their consideration.
>
> On the contrary, the trial court and this court are enjoined to, and do, examine into,



> and determine, the validity of attacks upon indictments, especially of this kind, from the broad and enlightened standpoint of common sense and right reason rather than from the narrow standpoint of petty preciosity, pettifogging, technicality or hair splitting fault finding.

*Parsons v. United States*, 189 F.2d 252, 253 (5th Cir. 1951) (footnotes omitted). Although indictments must be specific and precise as to the acts and crime charged, the law does not compel a ritual of words.

Taken as a whole, the facts set forth in the indictment here sufficiently allege an intent by defendants to deprive the inmates of their constitutional right to due process.

The indictment alleges that defendants intended to demonstrate by their actions that a prisoner seeking to escape from the Mobile County jail would be shot without a trial, whether or not the escape could have been prevented by other measures. The key to the message which defendants are alleged to want to communicate to the inmates was that they would not just be charged with escape or attempted escape and tried under the protections of due process of law, but they would be deprived of that due process right guaranteed to them by the Constitution. So read, the indictment alleges sufficient facts to show an intent to deprive the inmates of a constitutional right, without

the recitation of the words "knowing" and "willful" or "intentional," or any of their derivations.

*Cruikshank* does not stand, as argued, for the proposition that intent must be charged by specific words. The indictment in that case failed because it baldly alleged that defendants conspired to deprive citizens of "every, each, all, and singular" rights without specification of any particular right. The *Purvis* indictment specifies which constitutional right is at issue, namely the deprivation of the right to due process.

*Wilkins* was cited by the district court for the proposition that a more specific charge is necessary. In *Wilkins*, the indictment upon which a conviction was upheld was, in all practical effects, identical to the one at issue here. In that case, defendants argued that the indictment did not state an offense against the United States. The district court attached considerable significance to the *Wilkins* court's remark that "[a]ppellants never at any time objected to or took exception to the form of the indictment but stood on the proposition that it charged no offense . . . ." *Wilkins v. United States*, 376 F.2d 552, 562 (5th Cir.), *cert. denied*, 389 U.S. 964, 88 S.Ct. 342, 19 L.Ed.2d 379 (1967), quoted in *United States v. Purvis*, 436 F.Supp. 770, 772 (S.D.Ala.1977). Apparently, the district court read this statement as an intimation that the form was suspect and vulnerable to attack. It says as much in discussing *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), and *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16



L.Ed.2d 239 (1966). Admitting that the indictments in these § 241 cases were "very similar in wording to Count One in this case," the court stated that the cases "offer nothing in terms of authority on the issue of the absence of an allegation of specific intent in the indictment *if properly presented to the court.*" 436 F.Supp. at 773 (emphasis added). The court sought to distinguish *Hayes v. United States*, 464 F.2d 1252 (5th Cir. 1972), which sustained a similar indictment, in the same fashion.

The omission of an element of the crime, however, is not a mere formality that may be waived. "An indictment that fails to allege each material element of an offense fails to charge that offense." *United States v. London*, 550 F.2d 206, 211 (5th Cir. 1977). A motion for dismissal for failure to state an offense "shall be noticed by the court at any time during the pendency of the proceedings." Fed.R.Crim.P. 12(b)(2).[3] The court can raise the issue *sua sponte*. The objection raised in *Wilkins*, moreover, necessarily included the specific intent issue. Failure to charge specific intent is but a particular aspect of the failure to charge an offense. The *Wilkins*

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3 Fed.R.Crim.P. 12(b)(2) reads:

> (b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion . . . The following must be raised prior to trial:
>
> • • •
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); . . .

court did have the question of the validity of the form before it, an issue which it considered.

None of the other cases cited by defendants compels a contrary result. *United States v. Musgrave*, 444 F.2d 755 (5th Cir. 1971), *cert. denied*, 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973); *United States v. Morrison*, 536 F.2d 286 (9th Cir. 1976).

In *Musgrave*, cited for the proposition that an indictment omitting an essential element is fatally defective, the Government conceded that that element was missing.

The Ninth Circuit in *Morrison* struck down an indictment alleging misappropriation of less than $100.00 in postal funds in violation of 18 U.S.C.A. § 1711 because it failed to allege specific intent even though the statute does not identify the element of intent. The allegation in that indictment that the defendant "did convert . . . without authorization by law . . . ," 536 F.2d at 289, the court noted, was inherently ambiguous and could have charged a tort of conversion instead of a crime.

Conspiracy is the gravamen of the offense under 18 U.S.C.A. § 241. *United States v. Guest*, 383 U.S. 745, 753-754, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). The 1874 revision of this statute deleted the redundant language "with intent" from its first paragraph. "Conspiracy" incorporates willfulness and specific intent. As the Supreme Court stated in *Frohwerk v. United States*, 249



U.S. 204, 209, 39 S.Ct. 249, 251, 63 L.Ed. 561 (1919) (brought under the Espionage Act of 1917), "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it."

The indictment in question adequately contains the elements of the offense charged and fairly informs defendants of this charge. It enables them to plead an acquittal or conviction in bar of future prosecutions for the same offense. While this objection could have been forestalled by the inclusion of technical "intent" terms, such formality is unnecessary where the statute itself contains no such terms and the indictment clearly sets forth a charge of specific intent in the factual averment. The defendants are of course entitled to an adequate jury instruction regarding the intent necessary for conviction.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

versus Criminal No. 77-66

THOMAS J. PURVIS, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

A two-count indictment was filed on June 27, 1977, against the defendants in the shooting death of inmate Louis Wallace in an escape attempt at the Mobile County jail on October 12, 1976. Count One charged all of the defendants with violation of 18 U.S.C. §241. Count Two was lodged against only defendant Stanford and it charged criminal actions on his part under 18 U.S.C. §242.

In July of this year, the defendants filed respective motions to dismiss on the ground that the indictment was fatally deficient on both counts. In regard to Count One, the defendants alleged that there was no allegation of specific intent to deprive Wallace of his civil rights which they claimed was an essential element of



the crime that must appear in the indictment. It was asserted that Count Two was flawed due to the absence of the word "willfully" in reference to the alleged deprivation of the deceased's civil rights. Based upon these omissions, the defendants moved for dismissal of the indictment. It is the opinion of this court that the motions are well taken.

The questions before the court are legal and not factual. Count One has been attacked for failure to charge these defendants with "intent to deprive" Louis Wallace of certain civil rights. Count Two has been attacked for failure to charge the defendant James H. Stanford with "willfully depriving" Louis Wallace of certain civil rights.

This ruling does not pass judgment upon the credibility of what did or did not happen at the time and place set out in the indictment.

Everyone is reminded that the Grand Jury which considered this matter has not been discharged and should be governed accordingly.

Count One of the *Purvis* indictment was based on 18 U.S.C. §241 which provides for criminal sanctions in the event that "two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . ." 18

U.S.C. §241. In terms of the essential elements of a valid §241 indictment, the Fifth Circuit, in *Wilkins v. United States*, 376 F.2d 552 (5th Cir. 1967), cited with approval the old Supreme Court case of *United States v. Cruikshank*, 92 U.S. 542 (1876) 23 L.Ed. 588 for the proposition that a §241 indictment "must allege that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of some right secured by the Constitution, and must charge positively and not inferentially everything essential." *Wilkins, supra*, at 562.

In *Wilkins*, the court noted the "[a]ppellants never at any time objected to or took exception to the form of the indictment." *Wilkins, supra*, at 562.

The Court, in *Cruikshank*, stated that a "crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances." *Cruikshank, supra*, at 558.

An examination of the indictment in this case reveals that no allegation of the requisite intent to deprive Wallace of his civil rights is to be found in Count One. Only the bare charge that the defendants "conspired together . . . to injure, oppress, threaten and intimidate inmates of the Mobile County Jail who were citizens of the United States in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and laws of the United States not to be deprived of life without due process of law, which conspiracy



resulted in the death of Louis Wallace, an inmate at the Mobile County Jail" appears in the formal charge against the defendants. According to the Fifth Circuit in their pronouncements in the *Wilkins* decision, more is necessary for a true and proper indictment under this historic and extraordinary federal criminal statute. As further emphasis and elaboration upon the importance of the allegation of specific intent in the indictment, the *Wilkins* court cited the Eighth Circuit case of *Buchanan v. United States*, 233 F. 257 (8th Cir. 1916). The Eighth Circuit reasoned therein that the specific intent of the defendants to undermine an individual's civil rights must be set out in the indictment. The *Buchanan* court went on to state that if the defendants perpetrated acts that functionally denied federal rights but were performed in the belief that their conduct was serving a legitimate purpose, then "they did not violate [§241]." *Buchanan, supra*, at 258. Most importantly, the *Buchanan* court hypothesized that a homicide that operates as a denial of federal rights might spring not from an intent to deprive a person of federal rights but from "personal malice," the latter of which does not bring §241 into play. Consequently, to insure the indictment's sound basis, that express intent must be charged or the indictment is lacking. The *Purvis* indictment is plainly remiss in this regard. Of great significance, too, on this issue is the Fifth Circuit case of *United States v. Musgrave*, 444 F.2d 755 (5th Cir. 1971). In that decision, involving as does the instant case a statutory criminal conspiracy charge, the court declared that one of the counts "of the indictment is fatally defective since it omitted an essen-

tial element of the offense — 'intent to defraud the Home Savings Association of Odessa, Texas.' Any conviction based on a fatally defective indictment must, of course, be reversed." *Musgrave, supra,* at 760-61. By analogy, it is clear that the *Musgrave* opinion casts further doubt on the validity of Count One of the indictment before us.

The question in Count One is *not* whether the defendants intended to act unlawfully.

The question *is* did the defendants "intend to deprive Wallace of his civil rights."

In support of the indictment, a number of cases were urged by the United States Attorney, but neither the precedent he relied upon nor the case law this court researched and reviewed were persuasive. In *Anderson v. United States,* 417 U.S. 211, 227 n.13, 41 L.Ed.2d 20, 33 n.13, 94 S. Ct. 225 (1974), the Supreme Court noted that the indictment before them "was similar to those used in other §241 prosecutions." The *Anderson* indictment in part read "the defendants herein, did *unlawfully, wilfully* and *knowingly* conspire . . . to injure and oppress . . . the free exercise . . . of certain rights . . . secured . . . by the Constitution . . . . * * * to cause fraudulent and fictitious votes to be cast . . . all with the purpose and intent . . . ." (emphasis added) There are no similar averments in the *Purvis* indictment. Furthermore, in the *Anderson* pleadings (see file) the defendants did not attack the indictment on the ground of failure to allege



intent more specifically. The court did not address itself to this issue but limited its decision to holding a §241 indictment was not unconstitutionally vague and gave adequate notice of the specific charge. Suffice it to say, the allegations in the *Anderson* indictment are much more specific than in the *Purvis* indictment.

This court is cognizant of the Fifth Circuit's position that the "validity of an indictment is determined from reading the indictment as a whole . . . and . . . must be determined by practical, not technical, considerations." *United States v. Markham,* 537 F.2d 187, 192 (5th Cir. 1976). However, the *Markham* indictment charged the defendants "knowingly, willfully" violated the federal criminal statutes, as did the *Anderson* case, whereas, the indictment in the case *sub judice* does not contain such an averment. Again, in those cases the court did not address itself to a claimed failure to allege intent more specifically.

The Government proffered as support for the indictment the well known companion cases of *United States v. Price,* 383 U S. 787, 16 L.Ed.2d 267, 86 S. Ct. 1152 (1966); and *United States v. Guest,* 383 U. S. 745, 16 L.Ed.2d 239, 86 S. Ct. 1170 (1966), both of which involved §241 indictments very similar in wording to Count One in this case. The *Price* pleadings were obtained by this court (see file) and revealed no challenge by the defendants that the indictment was fatally defective due to the absence of a specific intent allegation. The Supreme Court did not address itself there to

the issue before this court. The Court stated the "sole question presented in these appeals is whether the specified statutes make criminal the conduct for which the individuals were indicted." *Price*, at 789. Similarly, the *Guest* indictment did not contain an allegation of specific intent. The Supreme Court noted in passing that the "defendant [only] moved to dismiss the indictment on the ground that it did not charge an offense under the laws of the United States." *Guest*, at 748. The issue of the omission of specific intent was not raised and the Court did not address itself to the issue before this court. While these two cases represented major developments in the field of §241, they offer nothing in terms of authority on the issue of the absence of an allegation of specific intent in the indictment if properly presented to the court.

In its search for cases wherein an allegation was made that the §241 indictment failed to allege the specific intent, this court found and considered *Hayes v. United States*, 464 F.2d 1252 (5th Cir. 1972). The court stated "[defendants in the District Court] moved to dismiss the indictment . . . . With respect to Count 1, they contended . . . [that] the count was defective because it failed to allege a specific intent on the parts of the [defendants] to deprive the Negro students of a constitutionally protected right." *Hayes*, at 1255. That motion was denied by the District Court and "[o]n direct appeal the appellant did not argue . . . that the trial judge had erroneously denied their motions to dismiss." Id. at 1256. The Circuit Court therefore did not



address itself to that issue. This is an indication that the Fifth Circuit still adheres to its position as stated in *Wilkins* and of their unwillingness to overrule *Wilkins* and *Cruikshank*, supra, if such an issue were properly presented to them.

In view of all the precedent set out above and the general statement of law that an egregiously incomplete indictment is void, the defendants' motions to dismiss must be granted as to Count One of the indictment.

Count Two of the *Purvis* indictment is leveled only at the defendant Stanford who allegedly shot to death Louis Wallace and in doing so violated 18 U.S.C. §242. Section 242 states that criminal sanctions are in order for "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens . . . ." 18 U.S.C. §242.

The question in Count Two is *not* whether the defendant willfully or without lawful authority shot Wallace.

The question *is*, did the defendant shoot Wallace to *"willfully* (and intentionally) *deprive him of his civil rights"*?

Count Two of the *Purvis* indictment charges that "[o]n or about October 12, 1976, in Mobile, Alabama, within the Southern Division of the Southern District of Alabama, JAMES H. STANFORD, acting under color of the laws of the State of Alabama, did wilfully shoot and kill Louis Wallace, an inhabitant of the State of Alabama, and did thereby deprive Louis Wallace of the right secured and protected by the Constitution and laws of the United States not to be deprived of life without due process of law." The defendant argued that the absence of the word "willfully" in regard to the alleged deprivation of rights was insufficient, and could not stand as a valid charge under §242. This court believes the defendant is correct. In its brief filed in opposition to the motion to dismiss, the Government discredited the contention of the defendant that the failure to repeat the word "willfully" was not of great consequence in terms of the validity of the indictment. The Government cited in favor of its contention *Screws v. United States,* 325 U. S. 91 (1945), 89 L.Ed. 1495, and *United States v. Stokes,* 506 F.2d 771 (5th Cir. 1975). However, not only do these cases fail to address the question of the sufficiency of their respective indictments, but also the original indictments in the *Screws* and *Stokes* cases contained language that charged a willful deprivation of rights. The Fifth Circuit did confront a §242 indictment's omission of the word "willfully" in regard to the deprivation of rights in *Pullen v. United States,* 164 F.2d 756 (5th Cir. 1947). In its decision in *Pullen,* the court reversed the conviction of the defendants below on the ground that "if the statute



[§242] without the word 'willful' is bad, so would be an indictment [that omitted the word 'willfully' in regard to deprivation of rights] under the statute." *Pullen,* at 760. This aspect of *Pullen* is still a vital proposition of law in the Fifth Circuit. *Pullen* was cited rather recently as support for the proposition that "[a]ny conviction based on a fatally defective indictment must, of course, be reversed." *Musgrave, supra,* at 761. The court's hypothesis in *Buchanan, supra,* as applied to Count One, is of equal force in relation to Count Two. Ostensibly, the failure of the word "willfully" to appear a second time in the indictment in conjunction with the deprivation of rights is a grave mistake that condemns Count Two to the status of an insufficient charge under §242.

The *Screws* case deserves further comment. The facts which resulted in a conviction were much more aggravated than those *only alleged* in this case. The Supreme Court reversed the trial court on the same principle we are concerned with here, only in *Screws* the defect was in the judge's instructions to the jury, here, in the indictment. *Screws* reflects the sound judicial philosophy that a person's legal rights will not be violated, ignored, or runover to rectify the claimed violations of another person's legal rights.

The *Wilkins, et al* cases and the *Pullen* case focus on the legal rights defendants have to be properly indicted.

It is therefore ORDERED, ADJUDGED, and DECREED that Counts One and Two of the indictment

be, and are hereby, DISMISSED without prejudice as to all defendants because of the errors or defects set out herein.

Done, this the 17th day of August, 1977.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA

versus

THOMAS J. PURVIS
CHARLES C. WIMBERLY, SR.
WILLIAM L. SHIRLEY, JR.
JOHN C. McCORVEY, JR.
HAROLD E. DONALD
HARRY L. HUTTON, JR.
JAMES J. MANNING
CECIL E. BYRD
JAMES H. STANFORD

The Grand Jury charges:



*COUNT ONE*

From in or about the summer of 1976, to on or about October 12, 1976, in the Southern Division of the Southern District of Alabama, the defendants, THOMAS J. PURVIS, CHARLES C. WIMBERLY, SR., WILLIAM L. SHIRLEY, JR., JOHN C. McCORVEY, JR., HAROLD E. DONALD, HARRY L. HUTTON, JR., JAMES J. MANNING, CECIL E. BYRD and JAMES H. STANFORD, while acting as officials of the Mobile County Sheriff's Department, conspired together, with each other, and with other persons to the Grand Jury known and unknown, to injure, oppress, threaten and intimidate inmates of the Mobile County Jail who were citizens of the United States in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and laws of the United States not to be deprived of life without due process of law, which conspiracy resulted in the death of Louis Wallace, an inmate at the Mobile County Jail.

It was part of the plan and purpose of the conspiracy that the conspirators would, without lawful authority, shoot from ambush one or more of the said inmates during a planned escape attempt which was to occur through a hole dug in the wall of the Mobile County Jail, of which escape attempt the conspirators had prior knowledge.

*OVERT ACTS*

In furtherance of the aforesaid conspiracy, and to accomplish its objectives, the following overt acts, among

others, were committed within the Southern Division of the Southern District of Alabama:

(1) In or about the summer of 1976, at the Mobile County Jail, some of the conspirators decided to shoot an inmate during a future escape in order to bring such escapes to a halt.

(2) On October 12, 1976, prior to the death of Louis Wallace, at the Mobile County Jail, and after discovering that inmates in Cellblock 205 were attempting to dig a hole through the north wall of the jail in order to escape, some of the conspirators, at a staff meeting, discussed the upcoming escape attempt and agreed not to stop it and to ambush the inmates as they attempted to escape through the hole in the wall, with the intention of shooting one or more of the said inmates.

(3) On October 12, 1976, at the Mobile County Jail, some of the conspirators caused the north wall of the jail to be surveilled during the day from out of sight of the inmates in order to observe the progress of the escape attempt.

(4) On the evening of October 12, 1976, at the Mobile County Jail, some of the conspirators concealed themselves in the vicinity



of the jail in order to carry out the planned ambush and communicated by radio between themselves as to the progress of the digging of the hole in the north wall of the jail.

(5) On the evening of October 12, 1976, at the Mobile County Jail, in furtherance of the aforementioned conspiracy, Deputy Sheriff James H. Stanford shot to death inmate Louis Wallace when Wallace attempted to escape through the hole dug in the north wall of the jail.

In violation of Title 18, United States Code, Section 241.

*COUNT TWO*

On or about October 12, 1976, in Mobile, Alabama, within the Southern Division of the Southern District of Alabama, JAMES H. STANFORD, acting under color of the laws of the State of Alabama, did wilfully shoot and kill Louis Wallace, an inhabitant of the State of Alabama, and did thereby deprive Louis Wallace of the right secured and protected by the Constitution and laws of the United States not to be deprived of life without due process of law.

In violation of Title 18, United States Code, Section 242.

A TRUE BILL

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FOREMAN,
UNITED STATES
GRAND JURY
SOUTHERN DISTRICT
OF ALABAMA

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DANIEL L. BELL, II
SPECIAL ATTORNEY
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

JUNE, 1977



UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

November 15, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-2849 — U.S.A. vs. THOMAS J. PURVIS, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
/s/ SALLY HAYWARD
Deputy Clerk